STATE OF MICHIGAN

COURT OF APPEALS

In re CW, BW and DW, Minors.

CW, BW and DW,

Appellees,

and

VALERIU MARTIN and KAREN MARTIN,

Petitioners-Appellants,

v

DEPARTMENT OF HUMAN SERVICES,

Respondent-Appellee.

UNPUBLISHED
February 16, 2010

No. 292866
Genesee Probate Court
LC No. 09-016660-AM

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

In this adoption case, petitioners, Valeriu Martin and Karen Martin, appeal as of right an order upholding the Michigan Children's Institute ("MCI") superintendent, William Johnson's, denial of a consent to adoption, and dismissing adoption petitions for CW, BW and DW. For the reasons set forth in this opinion, we affirm.

I.

Petitioners' first claim on appeal is that the trial court improperly excluded proposed witnesses and documentary evidence that would have demonstrated contradictions and omissions in facts upon which Johnson relied to make his consent decision. Petitioners maintain that the trial court's error impaired their ability to demonstrate that Johnson acted arbitrarily and capriciously. "[A] trial court has the discretion to admit or exclude evidence." *Sherman-Nadiv v Farm Bureau Gen Ins Co*, 282 Mich App 75, 77; 761 NW2d 872 (2008). This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005); *Wolford v Duncan*, 279 Mich App 631, 637; 760 NW2d 253 (2008). An abuse of discretion involves far more than a difference in

judicial opinion. *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583, 588 (2008). Rather, it occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

In an adoption case, an individual who has filed a petition to adopt a state ward, and has not received consent from the MCI, may file a motion in court to challenge the MCI superintendent's denial of consent. MCL 710.45. However, our Court has made clear that the trial court may not decide the adoption issue de novo.

In *In re Cotton*, 208 Mich App 180, 185; 526 NW2d 601 (1994) our Court stated:

> Because the initial focus is whether the representative acted arbitrarily and capriciously, the focus of such a hearing is not what reasons existed to authorize the adoption, but the reasons given by the representative for withholding the consent to the adoption. That is, if there exist good reasons why consent should be granted and good reasons why consent should be withheld, it cannot be said that the representative acted arbitrarily and capriciously in withholding that consent even though another individual, such as the probate judge, might have decided the matter in favor of the petitioner. Rather, it is the absence of any good reason to withhold consent, not the presence of good reasons to grant it, that indicates that the representative was acting in an arbitrary and capricious manner.

In *Goolsby v Detroit*, 419 Mich 651, 678; 358 NW2d 856 (1984), our Supreme Court explained:

> The words 'arbitrary' and 'capricious' have generally accepted meanings[:]
>
> * * *
>
> Arbitrary is: '[Without] adequate determining principle[;] [f]ixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, decisive but unreasoned.'
>
> Capricious is: '[Apt] to change suddenly; freakish; whimsical; humorsome.'

Thus, a determination whether a superintendent's decision was arbitrary and capricious necessarily entails an examination of the superintendent's articulated reasons for the consent decision and whether those reasons were valid in light of the specific circumstances of the children.

Petitioners argue that CW, BW and DW's older sister, AW, and neighbors of the children's current foster parents, the Rabers, would have testified regarding; 1) the Rabers' quality of care, including their discipline, use of profanity, exposure to relatives who smoke "weed," and willingness to encourage sibling interaction, and 2) AW's history of running away from the Rabers' home. Petitioners also claim that an adoption licensing caseworker and a complaints specialist would have addressed complaints regarding the Rabers. This proposed testimony may have been relevant to a determination of whether the Rabers were qualified to

adopt the children, but did not tend to make it any more or less probable that petitioners were qualified to adopt the children. MRE 402. Consequently, the trial court did not abuse its discretion when it precluded these witnesses' testimony.

Next, petitioners argue that they would have testified that Johnson relied on "incorrect, false, and incomplete information." However, they do not identify the information which was allegedly incorrect or false. Similarly, petitioners argue that a MCI consultant would have testified that Johnson relied on reports, which were "patently false and incorrect." Again, petitioners do not identify the false reports. Regardless, the scope of the hearing was limited to whether Johnson's decision to withhold consent was arbitrary and capricious. *In re Cotton*, 208 Mich App at 185. Thus, the trial court did not abuse its discretion when it precluded testimony regarding whether the information Johnson relied upon was accurate.

Finally, petitioners argue that petitioner Karen Martin would have testified regarding the quality of care they provided, including the scheduling of doctors' appointments for AW's cancer treatment and DW's clubbed feet surgery. Likewise, petitioners argue that AW could have compared the quality of care petitioners provided the children from 2003 until the children were removed from their home in 2007, to the quality of care the Rabers' provided afterward. In addition, petitioners argue that many witnesses, including themselves, AW, Judy Raber, a DHS foster care worker, a DHS caseworker, and the children's health care and mental health providers, would have testified that the children's educational and psychological well-being had deteriorated since they were removed from petitioners' home.

In his consent decision, Johnson questioned petitioners' abilities to address the children's developmental needs. However, our review of the record indicates that Johnson's investigation into this consideration was limited. He testified that he did not review the children's medical, educational, mental health and attachment history while they lived with petitioners. Although Johnson consulted some DHS staff, he did not consult Angela Davis, who oversaw petitioners' care of the children and visited the home. Johnson assumed that petitioners addressed the children's disabilities, but he was unable to comment on "specific areas." Rather, it appears that Johnson focused his investigation on how the Rabers' currently address the children's needs. We concur with petitioners that the issue of whether Johnson had before him a complete evaluation of the circumstances of the children, including petitioners' ability to meet the children's needs, in advance of his adoption decision, would be relevant in a determination of whether his decision was arbitrary and capricious. *Goolsby*, 419 Mich at 678. The issue then becomes whether the trial court's decision to exclude the proffered evidence constituted an abuse of discretion.

From the outset we note that contained within the trial court's final order is a clear indication that the proffered testimony was considered. In reaching its conclusion, the trial court stated: "The Petitioner has submitted said offer of proof, which the Court has read and considered, along with the arguments, made at the hearing . . . ." Therefore, while we recognize the difference between allowing the evidence to be submitted in the normal course of the hearing and an offer of proof, the record clearly reveals that contrary to petitioner's claims, the trial court did consider the proffered evidence in reaching its decision that petitioner has failed to meet its burden by establishing "by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious . . . ." The trial court's assertion of the standard of proof in this case was correct. To prevail, petitioners needed to establish in the trial court by clear and convincing

evidence, that the decision by Johnson to withhold consent was arbitrary and capricious. MCL 710.45(7). Our Court in *In re Cotton* 208 Mich App at 185, held that if there exists good reasons why consent should be granted and good reasons why consent should be withheld, "it cannot be said that the representative acted arbitrarily and capriciously." Assuming that all the testimony included in petitioners' offer of proof was true, we conclude that pursuant to our decision in *In re Cotton*, inclusion of the proffered testimony could not have changed the outcome. Additionally, while the trial court did not allow petitioners to present the testimony during the Section 45[1] hearing, the trial court did allow petitioners to file an offer of proof. Review of the record clearly reveals that the trial court considered the proffered testimony in reaching its ultimate conclusions. While the proffered testimony arguably demonstrated more good reasons to grant the petition, other relevant evidence considered by the trial court also indicated good reasons for denial of the petition.[2] The trial court also understood its limited role in a Section 45 hearing when it responded to petitioners' offer of the proffered testimony by stating:

> You might even convince me Mr. Johnson was wrong, but even if you did that, do you have any evidence to show me his decision was unreasoned? He testified to all his reasons. Or just whimsical, or just got up this morning, and decided, ya (sic) know, this is a Friday. I think I'll send the (minor children) kids here.

Ultimately, we concur with the trial court's assessment of the proffered testimony, namely that it failed to prove the absence of any good reason to withhold consent. Rather, the proffered testimony merely added additional reasons for Johnson to have granted consent. Even if the trial court had considered the proffered testimony during the normal course of the Section 45 hearing, the offer of proof, together with all of the other evidence considered by the trial court, was insufficient for the trial court to have concluded that there were no good reasons for Johnson to have withheld consent. As stated in *In re Cotton*, ". . . it is the absence of any good reason to withhold consent, not the presence of good reasons to grant it that indicates that the representative was acting in an arbitrary and capricious manner." *In re Cotton*, 208 Mich App at 185. Given the trial court's reliance on our decision in *In re Cotton*, we cannot find that exclusion of the proffered testimony during the normal course of the hearing constituted a decision that was outside the range of reasonable and principled outcomes. *Saffia*, 477 Mich at 12. Accordingly, we find that the trial court did not abuse its discretion when it excluded the proffered evidence during the normal course of the hearing.

II.

Next, petitioners maintain that due process requires the admission of evidence to contradict Johnson's conclusions. Petitioners fail to support this argument with legal authority and this Court deems this portion of petitioners' argument abandoned on appeal. *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002).

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[1] MCL 710.45.

[2] The reasons listed by Johnson are included in Section III of this opinion.

Petitioners' second claim on appeal is that the trial court erred because it denied their request for psychological evaluations of themselves, the Rabers, and the children, individually and as a sibling set.

Petitioners argue that the psychological evaluations were requirements of the "full investigation" addressed in MCL 710.46(1). MCL 710.46(1) provides:

> Upon the filing of an adoption petition, the court shall direct a full investigation by an employee or agent of the court, a child placing agency, or the department. The court may use the preplacement assessment described in section 23f of this chapter and may order an additional investigation by an employee or agent of the court or a child placing agency. The following shall be considered in the investigation:
>
> (a) The best interests of the adoptee.
>
> (b) The adoptee's family background, including names and identifying data regarding the parent or parents, if obtainable.
>
> (c) The reasons for the adoptee's placement away from his or her parent or parents.

MCL 710.23f provides, in relevant part:

> (1) In a direct placement, an individual seeking to adopt may request, at any time, that a preplacement assessment be prepared by a child placing agency.
>
> * * *
>
> (5) A preplacement assessment is based upon personal interviews and visits at the residence of the individual being assessed, interviews of others who know the individual, and reports received under this subsection. The assessment shall contain all of the following information about the individual being assessed:
>
> (a) Age, nationality, race or ethnicity, and any religious preference.
>
> (b) Marital and family status and history, including the presence of other children or adults in the household and the relationship of those individuals to the adoptive parent.
>
> (c) Physical and mental health, including any history of substance abuse.
>
> (d) Educational and employment history and any special skills and interests.
>
> (e) Property and income, including outstanding financial obligations as indicated in a current financial report provided by the individual.
>
> (f) Reason for wanting to adopt.

(g) Any previous request for an assessment or involvement in an adoptive placement and the outcome of the assessment or placement.

(h) Whether the individual has ever been the respondent in a domestic violence proceeding or a proceeding concerning a child who was allegedly abused, dependent, deprived, neglected, abandoned, or delinquent, and the outcome of the proceeding.

(i) Whether the individual has ever been convicted of a crime.

(j) Whether the individual has located a parent interested in placing a child with the individual for adoption and a brief description of the parent and the child.

(k) Any fact or circumstance that raises a specific concern about the suitability of the individual as an adoptive parent, including the quality of the environment in the home, the functioning of other children in the household, and any aspect of the individual's familial, social, psychological, or financial circumstances that may be relevant to a determination that the individual is not suitable. A specific concern is one that suggests that placement of any child, or a particular child, in the home of the individual would pose a risk of harm to the physical or psychological well-being of the child.

Petitioners requested psychological evaluations of themselves and the Rabers, who had also previously expressed interest in adopting the children, but the trial court denied the request. The plain language of MCL 710.46(1) does not require a trial court to order psychological evaluations of a party seeking to adopt a child. Arguably, a trial court is permitted to rely on a MCL 710.23f preplacement assessment of an individual seeking to adopt a child. MCL 710.23f requires an assessor to collect information about the individual's physical and mental health, but it does not expressly require the individual to undergo a psychological evaluation. Had the Legislature intended the individual seeking to adopt a child to undergo a psychological evaluation of the individual, it would have included such a requirement in the statute as it requires a physical examination in MCL 710.23f(7) ("A child placing agency shall request an individual seeking a preplacement assessment to undergo a physical examination . . . "). *Estate of Shinholster v Annapolis Hosp*, 255 Mich App 339, 359; 660 NW2d 361 (2003) ("expressio unius est exclusio alterius," the express mention in a statute of one thing implies the exclusion of other similar things). Because neither MCL 710.46(1) nor MCL 710.23f expressly require a trial court to order psychological evaluations of a party seeking to adopt a child and petitioners fail to cite any other statutory authority requiring such psychological evaluations, the trial court did not err in failing to order psychological evaluations of petitioners or the Rabers.

Petitioners also unsuccessfully requested psychological evaluations of the children, individually and as a sibling set. Contrary to petitioners' claim, even if the preplacement assessment in MCL 710.23f required a psychological evaluation, it would be limited to the individual seeking to adopt a child, petitioners in this case, not potential adoptees. Absent any other statutory authority requiring psychological evaluations of these children, individually or as a sibling set, the trial court did not err in failing to order them.

III.

Next, petitioners argue that the trial court clearly erred when it concluded that petitioners failed to demonstrate by clear and convincing evidence that Johnson's decision to withhold consent was arbitrary and capricious. This Court reviews whether the trial court applied the correct legal principles and the arbitrary and capricious determination for clear error. *Boyd v Civil Service Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996), lv den 456 Mich 900 (1997). "[A] finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id.* at 235.

As previously stated, an individual seeking to adopt may file a motion with the court alleging that the decision to withhold consent was arbitrary and capricious. MCL 710.45. A trial court may dismiss the petition if the individual fails to demonstrate, by clear and convincing evidence, that the decision was arbitrary and capricious. MCL 710.45(7). On the other hand, if the individual meets the clear and convincing evidence burden, the trial court may terminate the rights of the appropriate court, child placing agency, or department and proceed with the adoption. MCL 710.45(8). The trial court may not decide the adoption issue de novo. *In re Cotton* 208 Mich App at 184. "[I]t is the absence of any good reason to withhold consent, not the presence of good reasons to grant it, that indicates the [superintendent] was acting in an arbitrary and capricious manner." *Id.* at 185. The trial court should focus on the reasons given by the superintendent for withholding the consent to adoption. *Id.*

We next examine the decisions listed by Johnson in his denial of the petition for adoption, and conclude that the reasons listed negate a finding by the trial court that his decision for denial was arbitrary and capricious.

Meeting the Children's Developmental Needs

Petitioners argue that Johnson's decision to withhold consent was arbitrary and capricious because he concluded that their ability to meet the developmental needs of the children was inadequate. They maintain that, if he had fully investigated evidence from DHS caseworkers, the GAL, the ALJ, and petitioners, he would have concluded otherwise. As previously stated, despite the fact that this evidence could offer additional reasons to grant the petition for adoption, the trial court did not abuse its discretion when it excluded the evidence. Rather, the record reveals that Johnson articulated good reasons for his decision, including the children's connections and threat of removal, petitioners' neglect, petitioners' degree of cooperation, and petitioners' failure to obtain a foster care license. Reviewing the record as a whole we are not left with a definite and firm conviction that a mistake was made by the trial court in upholding the denial of consent.

Connections and Removal

Johnson concluded that the children had been with the Rabers since June 2007, and had established a close psychological connection with them. In light of the problems the children experienced following their abrupt removal from petitioners' home after living with them for an extended time, Johnson concluded that it would not be in the children's best interests to remove them from another home where they have formed connections. Reviewing the record as a whole,

we are not left with a definite and firm conviction that a mistake was made by the trial court in upholding the denial of consent.

Neglect

Johnson also concluded that petitioners failed to assure the safety and well-being of the children. On appeal, petitioners question Johnson's consideration, stating that DHS failed to demonstrate abuse or neglect in the ALJ hearing. However, Johnson explained that, even though the ALJ concluded that DHS failed to demonstrate abuse or neglect, he was still wary of the spanking and cursing incident involving Worden and her continued relationship with petitioners. Prior to the incident, DHS staff had repeatedly warned petitioners not to leave the children in Worden's supervision, but petitioners ignored the warnings. After the incident, Worden moved in and out of the home. Even though petitioners promised Worden would leave if the three younger children returned to their home, the record reveals that petitioners continued to expose some of the minor children to Worden.

Cooperation and Hostility

Johnson concluded that petitioners repeatedly failed to cooperate with DHS, demonstrated hostility or threats, and failed to provide necessary information to pursue the adoption. Although the record is unclear regarding incidents involving hostility or threats, a April 24, 2007 assessment confirms that petitioners failed to provide requested information, thereby requiring DHS to seek it independently and leaving some information unknown. Even though petitioners claim that the DHS person assigned to them while the minors were residing with petitioners would have reported positive interactions with them, the trial court's review was limited to whether Johnson lacked good reasons to withhold consent, not whether there were also good reasons to grant it. *In re Cotton*, 208 Mich App at 185.

Foster Care Providers

Johnson concluded that petitioners were not approved foster care providers. On appeal, petitioners discount Johnson's consideration because; 1) they are pursuing a foster care license, 2) a foster care license was not previously required for their care of the younger children, and 3) DHS currently allows one of the minor children to live with them without a license. Petitioners do not cite to any authority discounting the foster care license in adoption proceedings. Rather, Johnson explained that a foster care license would indicate that petitioners had been subject to an agency assessment process, including training and conditions for approval. Furthermore, Johnson found that the delay while petitioners pursue a foster care license would further delay permanence for the minor children. The absence of a foster care license, combined with the fact that petitioners had not successfully been pre-approved as adoptive parents, served as just one of Johnson's considerations in withholding the consent to the adoption.

Overall, because Johnson articulated several good reasons for his decision, this Court concludes that the trial court did not clearly err when it found Johnson's decision was not arbitrary and capricious.

IV.

Lastly, petitioners request reasonable attorney fees and costs from this Court. This request is procedurally improper absent a separate motion pursuant to MCR 7.211(C)(8). Moreover, petitioners fail to support their position with authority. Because this Court will not search for such authority, this writer concludes that petitioners' argument is abandoned on appeal. *Flint City Council*, 253 Mich App 393 n 2.

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello